Office - Supreme Court, U.S.
FILED
JUL 6 1982
ALEXANDER L. STEVAS,
CLERK

82-17
No.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1981

JOSEPH M. COUCH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

THOMAS J. NOLAN
COUNSEL OF RECORD
ANDREW H. PARNES
CRYSTAL D. HESSION
600 University Avenue
Palo Alto, CA 94301
Telephone: (415) 326-2980
Counsel for Petitioner

BOWNE-PERNAU WALSH • 180 NINTH ST. • S.F., CA 94103 • (415) 864-2300

QUESTION PRESENTED

Whether the rule of *Dunaway v. New York*, 442 U.S. 200 (1979), which establishes a clear distinction between the level of suspicion required for a brief detention and that level required for a more lengthy seizure of an individual, shall be applied in the context of a ten-hour border detention for purposes of interrogating the person detained and securing a warrant for an x-ray search of that person.

TABLE OF CONTENTS

	Page
Question presented	i
Opinions below	1
Jurisdiction	2
Statement	2
Reasons for granting the petition	4
Conclusion	9

TABLE OF AUTHORITIES CITED

Cases

	Page
Dunaway v. New York, 442 U.S. 200 (1979)	i, 4, 5, 6, 7, 8
Terry v. Ohio, 392 U.S. 1 (1968)	5, 7
U.S. v. Aman, 624 F.2d 911 (9th Cir. 1980)	5
U.S. v. Erwin 625 F.2d 838 (9th Cir. 1980)	6
U.S. v. Hill 626 F.2d 429 (5th Cir. 1980)	7, 8
U.S. v. Nieves 609 F.2d 642 (2nd Cir. 1979), cert. denied, 444 U.S. 1085 (1980)	7
U.S. v. Perez-Esparza 609 F.2d 1284 (9th Cir. 1979)	5, 6
U.S. v. Ramsey, 431 U.S. 606 (1977)	4
U.S. v. Rodriguez, 592 F.2d 553 (9th Cir. 1979)	4

Constitution

United States Constitution, Fourth Amendment	5

Statute

28 U.S.C. § 1254(1)	2

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

JOSEPH M. COUCH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, Joseph Mark Couch, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on May 6, 1982.

OPINIONS BELOW

The memorandum opinion of the Court of Appeals [which is unreported] appears in the Appendix hereto. The District Court for the Central District of California did not issue a written opinion.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on May 6, 1982. No petition for rehearing was filed. This petition for certiorari is filed within sixty days of May 6, 1982. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On March 4, 1980, Agent Cook of the Drug Enforcement Administration told Customs Agent Souza that a reliable informant had relayed the following information: Five individuals, including Petitioner, planned to smuggle cocaine from Lima, Peru into the United States some time during the week of March 3, 1980. (TR[1] 23-24, 36, 60-65)[2] The informant described an elaborate scheme, alleging that the individuals would swallow capsules containing cocaine, then ingest a drug to inhibit their normal digestive processes, and take a laxative once they arrived at their destinations in order to expel the cocaine. The informant also stated that Petitioner had avoided an x-ray examination in Peru in December, 1979 because he had been overexposed to radiation in the past.

Agent Souza contacted Drug Enforcement Agency agents to assure the agency had lookouts placed at the airport. (TR 25) On March 5, Petitioner and one traveling companion arrived on a 7:30 a.m. flight from Peru. A routine search of their baggage and a further search of their per-

---

[1]"TR" refers to the Reporter's Transcript of the suppression hearing held May 5 and May 12, 1980.

[2]A more detailed statement of facts is contained in the memorandum opinion of the Appellate Court in Appendix A, P. A2-6.

sons revealed nothing suspicious. Petitioner was separated from his companion and transported to a Drug Enforcement Agency office.

At this time, the only verified information agents had was Petitioner's name. The District Court found the informant "merely indicated that there would be some people arriving and nothing more than that." (TR 116) Officials asked Petitioner to submit to an x-ray examination, but he refused, stating he had been overexposed to radiation in the past. (TR 39) Agents questioned Petitioner and informed him they suspected he was smuggling.

Around 10:00 a.m. on March 5, officials informed Agent Souza that Petitioner had been detained. He did not go to the airport, but immediately proceeded to the U.S. Courthouse where, he, along with other Drug Enforcement Agency agents and U.S. Attorney Dwyer, prepared an affidavit to obtain a warrant requiring Petitioner to submit to x-rays. At 2:30 p.m., Agent Souza phoned the officials who were holding Petitioner and learned he had refused food and beverage. This fact, and the fact that Petitioner had declined to be x-rayed claiming overexposure, were included in the affidavit. The affidavit was presented to the Magistrate around 4:30 p.m., and to Petitioner around 7:00 p.m., on March 5. (TR 30, 90-91)

Numerous x-rays revealed a number of opaque objects in his digestive tract. Petitioner was formally arrested the night of March 5. Over the next few days he excreted capsules which contained cocaine.

2. Petitioner moved to suppress the cocaine obtained as a result of the detention and subsequent x-rays. After

a hearing the District Court granted the motion, holding that the detention was unreasonable and that the informant's information was uncorroborated. (TR 116)

3. On the government's Appeal, a panel of the Court of Appeals reversed. The Court held that the ten-hour detention of Petitioner was reasonable and that the standard of *Dunaway v. New York* 442 U.S. 200 (1979) does not apply to border searches and seizures. The Court also held that the affidavit was sufficient to support the warrant.

REASONS FOR GRANTING THE PETITION

This case presents an issue of first impression for this Court. Recently, this Court established that probable cause is needed whenever a person is detained or seized for more than a brief period of time. (See *Dunaway v. New York*, 442 U.S. 200 (1979).) This Court has yet to determine if this standard should apply to prolonged border detentions for purposes of questioning and further searching of an individual. Accordingly, review by this Court is warranted.

While it is settled that border agents do have broader power than other police agents in conducting searches (*U.S. v. Ramsey*, 431 U.S. 606 (1977)), this Court has not permitted border agents to arrest an individual without probable cause. In reviewing border searches, this Court has applied a standard of reasonableness rather than probable cause.

As the level of intrusion on an individual rises, the border agent must have significantly more information to justify his conduct. (See *U.S. v. Ramsey, supra* 431 U.S. at 619; *U.S. v. Rodriguez*, 592 F.2d 553, 556 (9th Cir. 1979);

U.S. v. Aman, 624 F.2d 911, 912-913 (9th Cir. 1980).) Traditionally, then, courts have recognized that the Fourth Amendment limits border searches relative to the type of intrusion involved. The prolonged seizure of a person is a most significant intrusion into personal liberty.

> "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference by others, unless by clear and unquestionable authority of law. [Citations]" *Terry v. Ohio*, 392 U.S. 1, 9 (1968).

A full-scale seizure of the person has not been held valid without probable cause.

In *Dunaway v. New York, supra*, this Court distinguished the *Terry* standard necessary for brief stops, a standard requiring less than probable cause, from that necessary for a more lengthy custodial detention.

> "Indeed, any 'exception' that could cover a seizure as intrusive as that in this case would threaten to swallow the general rule of the Fourth Amendment. Seizures are 'reasonable,' only if based on probable cause . . .
>
> "[D]etention for custodial interrogation—regardless of its label—intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest." (*Id.*, at p. 213-216)

The *Dunaway* rule was applied in a border context in *U.S. v. Perez-Esparza*, 609 F.2d 1284 (9th Cir. 1979). In that case, a three-hour detention at a border checkpoint was held to violate the *Dunaway* standard.

> "We thus conclude that while Perez-Esparza was legally stopped for questioning, the Border Patrol

> lacked probable cause to arrest him and, therefore, could not detain him as was done in this case for custodial interrogation." (*Id.*, at p. 1288)

In the present case, the Appellate Court distinguished *Perez-Esparza* on the grounds that the border checkpoint was not the functional equivalent of a border and held that *Dunaway* does not apply to borders.

The Appellate Court relied on *U.S. v. Erwin* 625 F.2d 838 (9th Cir. 1980) in its decision. Officials in *Erwin* saw defendant's restricted movements and found items in her luggage which supported their belief that she had contraband in a body cavity. In upholding the detention, the *Erwin* court relied on the border distinction to justify the officials' actions. The *Erwin* court held that the detention did not exceed "what was necessary for the agents to conduct a legal border search."[3] (*Id.*, at p. 841) The *Erwin* standard implies that agents may undertake any seizure of the person so long as it is necessary to complete a border search. *Erwin* and the Appellate Court decision here grant limitless power to border agents, a concept never sanctioned by this Court. The issue presented by this petition is one where this Court must determine the appropriate limits on seizures of individuals at a border.

---

[3]Arguably, in *Erwin*, agents had enough information, as more information was uncovered at each investigative step, to justify the body cavity search. In the present case, at the time of the detention, agents knew no more than Petitioner's name, and the District Court held that the detention was unreasonable as based solely on that information.

In *U.S. v. Nieves* 609 F.2d 642 (2nd Cir. 1979), cert. denied, 444 U.S. 1085 (1980), the defendant contended that a post-customs detention constituted a *Dunaway* arrest. The Court applied the investigative detention standard articulated in *Terry v. Ohio* 392 U.S. 1 (1968), which permits a limited investigative stop on circumstances less than probable cause, and held that the stop of the defendant in *Nieves* and her voluntary decision to accompany the official to the customs inspection area was a lawful *Terry* stop, not a *Dunaway* arrest.

Nieves did not reach the *Dunaway* issue because the defendant consented to the detention. However, if the *Terry* standard applies in a border context, *Dunaway* must also control border seizures as it defines the limits of a *Terry* stop.

In contrast, the present case squarely presents the issue of a *Dunaway* arrest at a border. There is no question that Petitioner did not consent. He was stopped, his luggage was searched and when neither of these steps revealed anything suspicious, he was then taken from the inspection area to a Drug Enforcement Agency office and held for the day. He was questioned and told that officials suspected he was smuggling. At 5:00 p.m., after officials had told Agent Souza that Petitioner had refused food and beverage and that he would not submit to x-rays because he was afraid of overexposure, Petitioner was handcuffed and transported to a hospital where x-rays were taken.

A less egregious detention, though it did not occur at the border, was described in *U.S. v. Hill* 626 F.2d 429 (5th Cir. 1980) as a *Dunaway* arrest. Police received an

anonymous tip that a drug deal was "going down" at the Greensboro Airport and one participant was a black man wearing a green coat with white fur trim. Sheriff's deputies saw the man leave on a flight to Atlanta and the above information was relayed to DEA agents in Atlanta. Two days later DEA Agent Markonni saw the described man disembark from a Los Angeles-Atlanta flight. Markonni approached defendant and asked for his consent to a search, but defendant refused. The defendant began to accompany the agent to an office, then began running through the airport. He was eventually subdued and searched, and agents found PCP. Noting that *Dunaway* has been applied in various situations, the *Hill* court held:

> "[U]nder the reasoning employed in *Dunaway*, Markonni's request for Hill to accompany him to the Delta office constituted a significantly greater intrusion than a brief *Terry* stop and thus, must be classified as an arrest requiring probable cause. First, as in *Dunaway*, the intrusion in this case was not limited to brief, on-the-spot questioning . . . [T]he request [to accompany Markonni] signaled the beginning of a more extended interrogation which was to occur in a place other than where it began. Second, as in *Dunaway*, Hill was never informed that he was 'free to go,' and the circumstances surrounding the request indicate that Hill would have been physically restrained if he had refused . . . Third, as in *Dunaway*, the circumstances indicate that the detention involved here was for the purpose of interrogation. In sum, the scope of the intrusion . . . was significantly greater than that involved in a brief *Terry* stop, and therefore amounted to an arrest." (*Id.*, at p. 435-436)

Here, the trial court held that the ten-hour detention of Petitioner was

> "unreasonable under the circumstances, the lack of the proper corroboration of the confidential informant, who merely indicated that there would be some people arriving and nothing more than that . . . I do not think that is sufficient to . . . interrogate someone, to go ahead and detain him for up to ten hours . . ." (TR 116)

The lengthy detention, coupled with the movement of Petitioner to the DEA office and the questioning there went beyond acceptable limits on official conduct at a border. The instant case presents an excellent factual vehicle for this Court to determine these limits.

CONCLUSION

The petition for a writ of certiorari should be granted.

DATED: June 28, 1982

Respectfully submitted,

THOMAS J. NOLAN
ANDREW H. PARNES
CRYSTAL D. HESSION
Counsel for Petitioner

(Appendix follows)